

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. ISAAC DOMINGUEZ, DEFENDANT AND APPELLANT.

G. R. No. 17021. February 23, 1921

Ponente: VILLAMOR, J.

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VILLAMOR, J.:

The fact which gave rise to the present appeal is described in the information as follows:

"That on or about the 19th day of January, 1920, in the city of Manila, Philippine Islands, the said accused who was a salesman at the Philippine Education Co., Inc. did then and there receive the sum of seven pesos and fifty centavos (P7.50) from one Lamberto Garcia as payment for five copies of Sams' 'Practical Business Letters' bought from the store of the said company, which amount should have been turned over and delivered by him (accused) to the company's cashier or his authorized representative therein; that instead of delivering the said amount to the said cashier or his representative therein, which he knew it was his obligation to do, the said accused did then and there willfully, unlawfully and criminally misappropriate and convert it to his own personal use to the damage and prejudice of the said Philippine Education Co., Inc. in the sum of seven pesos and fifty centavos (P7.50) equivalent to 37 1/2 pesetas."

At the close of the trial the court found the accused guilty of the crime of estafa of the sum of P7.50 and sentenced him to be imprisoned for two months and one day of arresto mayor, with the accesories provided by law, and costs.

Appeal having been taken to this Supreme Court, the counsel for the accused assigns, as error committed by the court, its finding that the accused is guilty of the crime charged and its action in imposing upon him the penalty corresponding to a principal in the crime of estafa.

It is proved that the accused, as salesman of the bookstore "Philippine Education Co., Inc." sold on the morning of January 19, 1920, five copies of Sams' "Practical Business Letters," of the value of seven pesos and fifty centavos (P7.50), which the accused should have immediately delivered to the cashier but which he did not deliver, until after it was discovered that he had sold the books and received their value without delivering it to the cashier, as was his duty.

The accused alleges that he did not deliver the money immediately after the sale, because the cash boys were very busy as well as the cashier, while he had to go to the toilet for some necessity, and upon coming out, the cashier caught him by the arm and asked him for the money, and then he delivered the sum of P7.50 to him; and that it was not his intention to make use of said money. Such claim, nevertheless, does not exempt him from the criminal responsibility which he had incurred, for the evidence before us shows clearly that he attempted to defraud the "Philippine Education Co., Inc." Upon being asked for the money, he first said that a woman, whom he did not know, bought books, without having paid, for the reason that she was, according to herself, in a hurry; and, later, he went out of the store to talk to a friend who was employed in the Pacific Mail Steamship Co. to tell him that if anyone should ask him if he (the employee of the Pacific Mail Steamship Co.) bought books that morning in the store of the "Philippine Education Company" he should answer affirmatively. Furthermore, he had also declared

to the manager of the bookstore that he used part of the money in purchasing postage stamps.

There can be no doubt as to the injury which the accused would have caused to the interests of the company in retaining for himself the proceeds of the sale in question. But the question of law to be decided is whether the fact that the accused retained in his possession the proceeds of the sale, delivering them to the cashier only after the deceit had been discovered, constitutes a consummated offense or merely a frustrated offense of estafa.

Should the fact that the accused attempted to get certain bundles of merchandise at the station, by means of the presentation of the tag sent to the consignee in a letter which must have been taken from the mail, it not having been proven by whom or how it came to the accused, who did not attain their object, because the bundles had been withdrawn two or three days before by the consignee, be considered as an attempted or frustrated offense? The supreme court of Spain in its decision of January 3, 1876, in deciding the appeal taken by the accused, who alleged that the act constituted only an attempt and not a frustrated estafa, declared that the appeal was not well taken, on the ground that the offense is frustrated when the accused performs all the acts of execution which would have produced the crime, and, nevertheless, do not produce it by reason of causes independent of the will of the actor, and that in said case the appellant, together with his coaccused attempted to take possession of the two bundles which they believed were at the station, by going there and presenting the tag, and they did not succeed because these bundles had already been taken, which constitutes the frustrated crime.

In his commentaries on the Penal Code Viada asks the following question: "Is immediate return by the accused of the thing he intended to convert, as soon as the injured party found out the fraud committed, sufficient to divest the act of its consummated character and to place it within the limits of a mere frustrated offense?" "The religious society of Santa Clara deposited, in the year 1868, with D. Manuel Nunez an oil painting on copper, but when they demanded it a few years afterwards, the latter delivered to them the same frame but with merely a copy of the original painting, which, upon his order, a painter had made for the sum of 40 pesetas. The substitution having been afterwards noted, the society protested and Nunez returned the original, valued at 125 pesetas, and in turn obtained the copy referred to. But, in the meantime a criminal action having been instituted upon this fact and prosecuted to trial, the Madrid court, holding that Nunez had defrauded and injured the society in the amount of the difference in the value of the paintings, sentenced him, as principal in the consummated crime of estafa, defined in number 5 of article 548 of the Code, to the penalty of two months and one day of *arresto mayor*, together with the accessories, and costs. An appeal having been taken from said judgment, on the ground that it violated among others, article 3 of the Code, the Supreme Court, declaring that the appeal was well taken, held that the estafa committed was mere frustrated estafa, 'Considering that while the acts of D. Manuel Nunez appear to have been actuated by the desire to convert the painting to his own use and the consequent injury of its owner, and that to that end he performed all the acts which should produce the crime as a consequence, nevertheless, the injury and the appropriation were not realized, and therefore the crime was not consummated because of a cause independent of his will, which was the discovery of the substitution of the plate, after which the owner obtained what belonged to him without the objection of the depositary and without any delay juridically appreciable—therefore, the trial court in holding as consummated an offense that was frustrated, violated, in failing to apply it, article 3 of the Code.' " (1 Viada, 65.)

The same author puts and solves the following question:

"Where a person appointed Commissioner to make collection of debts due to the public treasury for real estate taxes owing by a mining company goes to a store and exacts of the owner thereof a certain sum in order that he might not file a complaint by virtue of which the owner might have to pay a big fine because the establishment was not registered in the corresponding class, and the owner pays him part of the sum demanded, but he is in the act caught by agents of the authority who were detailed for the purpose, is he guilty of the consummated or

simply frustrated crime of estafa? The criminal branch of the court of Seville found him guilty of the former and sentenced him to the penalty of two months and one day of *arresto mayor*. But, appeal having been taken from the judgment on the ground that the fact constituted only an attempt to commit estafa, the Supreme Court, while not of the same opinion, however, held that the crime committed was merely frustrated: 'Considering that while the acts executed by the appellant should be qualified, not merely as an attempt, as claimed by the appellant, inasmuch as he did not limit himself to commencing the acts of execution of the crime, but as a frustrated crime, because the accused performed all the acts of execution which should produce the crime as a result, such as the obtaining of the money exacted, in this manner apparently realizing his object, but which acts nevertheless did not produce the crime by reason of a cause independent of his will, which cause in this case was the appearance of agents of the authority at the place, as a consequence of the complaint filed by Da. Candelaria Polanco to the treasury deputy, a fact which prevented the consummation of the crime prosecuted, which would have consisted in completely divesting the owner of his money, a result prevented by the vigilance of the authorities: Considering that in not so holding the trial court erred on a point of law, as claimed, and violated the articles of the Penal Code to which the appeal refers, etc., etc.' " (Viada, Suppl. 1887-1889, p. 8.)

Applying the doctrine, established by the supreme court of Spain in the decisions cited, to the case at bar, we are of the opinion, and so hold, that the appellant is guilty of the frustrated offense of estafa of 37 1/2 pesetas, inasmuch as he performed all the acts of execution which should produce the crime as a consequence, but which, by reason of causes independent of his will, did not produce, it, no appreciable damage having been caused to the offended party, such damage being one of the essential elements of the crime, due to the timely discovery of the acts prosecuted.

From what has been said, it results that the judgment appealed from should, as it is hereby, modified, and the accused is sentenced to pay a fine of 325 pesetas, with subsidiary imprisonment in case of insolvency, and to pay the costs of the trial. So ordered.

Mapa, C. J., Araullo, Street, and Malcolm, JJ., concur.

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